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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 510

RAY C. STEVENSON, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The per curiam opinion of the circuit court of appeals (R. 36) is reported at 163 F. 2d 750. The opinion of the district court (R. 17–25) is reported at 72 F. Supp. 627.

JURISDICTION

The judgment of the circuit court of appeals was entered October 9, 1947 (R. 37). The petition for a writ of certiorari was filed January 3, 1948. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner was convicted on two counts, the first charging robbery of a bank by force and violence, and by putting the bank officials in fear by threats and by use of dangerous weapons (12 U. S. C. 588b (a)), and the second charging that in the course of the robbery the officials were assaulted and their lives put in jeopardy by the use of dangerous weapons (12 U. S. C. 588b (b)). Petitioner was sentenced to imprisonment for 15 years on the first count and for 25 years on the second count, the terms to run consecutively. Two months after petitioner had commenced to serve the first term, the judgment was modified to make both sentences run concurrently. With good time allowances, the minimum term of the sentence on the first count has expired. The following questions are presented:

1. Whether the judgment and sentence on the second count are void.

2. Whether the two sentences were alternative sentences for the same crime, service of one of which would entitle petitioner to his discharge.

STATUTE INVOLVED

Section 2 of the National Bank Robbery Act of May 18, 1934, c. 304, 48 Stat. 783, 12 U. S. C.

588b,[1] as of the time the acts of which petitioner was convicted took place, in pertinent part provided:

> (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both.

STATEMENT

On September 9, 1937, petitioner was indicted in the District Court for the Western District of Michigan in two counts under the National Bank Robbery Act. The first count charged that petitioner and two others did feloniously take approximately $33,000.00 belonging to a national

[1] Subsequent amendments of Section 2 (Acts of Aug. 24, 1937, c. 747, 50 Stat. 749; June 29, 1940, c. 455, 54 Stat. 695) are immaterial to this case.

bank from the presence of certain bank officials "by force and violence, and by putting in fear the said [bank officials] by threat of force and violence and by the use and display of dangerous and deadly weapons, to-wit, one sawed-off shotgun and two pistols." The second count charged that petitioner and two others did feloniously "while committing the offense set forth, charged and described in Count 1 of this indictment, assault [the bank officials] and put in jeopardy the lives of [the bank officials] by the use of dangerous weapons, to-wit, one sawed-off shotgun and two pistols" (R. 9–11). After a jury trial, petitioner was convicted on both counts and was sentenced to imprisonment for 15 years on the first count, beginning November 8, 1937, and for 25 years on the second count, the second sentence to run consecutively to the first (R. 12–13). On January 18, 1938, after petitioner had begun service of the sentence on the first count, the trial court amended its judgment to make the sentences on both counts run concurrently (R. 13–14). There was no appeal.

On or about February 18, 1947, petitioner, who had been transferred to Alcatraz in 1938, filed in the District Court for the Northern District of California the petition for a writ of habeas corpus which gave rise to the present proceeding. He contended that the two counts of the indictment charged but a single offense; that the trial court

in imposing a sentence of 15 years on the first count exhausted its power to punish for the offense, and that the sentence on the second count is void; and finally that, with allowance for good time, he had completed service of the 15-year sentence, and further imprisonment would subject him to more than one punishment for the same crime (R. 2–8). The court ordered the warden to show cause why the writ should not issue (R. 15–16). The Government then filed a motion to dismiss the petition on the ground that it failed to state grounds for relief (R. 16). The court, in a carefully considered opinion, dismissed the petition and discharged the order to show cause (R. 17–25). The judgment was affirmed on appeal (R. 37).

ARGUMENT

This is another of a long series of cases involving sentences imposed for violations of Section 2 of the National Bank Robbery Act, 12 U. S. C. 588b, *supra*. It was at first thought that subsections (a) and (b) of Section 2 created separate offenses, and in many of the early cases separate sentences were imposed where the indictment charged robbery in one count and assault during commission of the robbery in another. See, e. g., *United States* v. *Harris,* 26 F. Supp. 788 (S. D. Cal.). But after the decision in *Durrett* v. *United States,* 107 F. 2d 438 (C. C. A. 5), it was recognized that the two subsections denounce the

same offense in a lesser, and in a more aggravated, form.[2] Since that time those prisoners who had received two separate sentences have sought by various means to have the courts invalidate the heavier of the two penalties. The invariable result in the circuit courts of appeals, however, has been the sustaining of the more severe sentence. Thus, a heavier sentence imposed on the first count was upheld in *Holbrook* v. *United States,* 136 F. 2d 649 (C. C. A. 8); *Coy* v. *Johnston,* 136 F. 2d 818 (C. C. A. 9), certiorari denied, 320 U. S. 788; *Minntole* v. *Johnston,* 147 F. 2d 944 (C. C. A. 9), motion for leave to file a petition for writ of certiorari denied, 324 U. S. 831; and *Holbrook* v. *Hunter,* 149 F. 2d 230 (C. C. A. 10). A heavier sentence on the second count was upheld in *Hewitt* v. *United States,* 110 F. 2d 1 (C. C. A. 8), certiorari denied, 310 U. S. 641; *Garrison* v. *Reeves,* 116 F. 2d 978 (C. C. A. 8); *Wells* v. *United States,* 124 F. 2d 334 (C. C. A. 5), certiorari denied, 316 U. S. 661; *Holiday* v. *United States,* 130 F. 2d 988 (C. C. A. 8), certiorari denied, 317 U. S. 691; and *Gant* v. *United States,* 161 F. 2d 793 (C. C. A. 5).

1. In this case, petitioner was sentenced to 15 years on the first count and to 25 years on the second, and he argues that the second sentence is illegal and void since both were imposed for a single offense (Pet. 14–17). However, where two

[2] The Government conceded as much in *Holiday* v. *Johnston,* 313 U. S. 342, at 349.

sentences are imposed simultaneously and are later made to run concurrently, and where neither is of itself invalid under the terms of the statute, there is no invalidity under the constitutional prohibition aganst double jeopardy. Reason and justice dictate that, in such a case, the court and not the prisoner shall have the right to select the sentence which he shall be required to serve. To adopt petitioner's view is completely to disregard the intention of the trial court that he should be required to serve 25 years' imprisonment, a term which undoubtedly would have been imposed if there had been only one sentence. Cf. *Holbrook* v. *United States* and *Coy* v. *Johnston, supra.* It cannot with reason be said that petitioner is subjected to double jeopardy by his imprisonment under the 25-year sentence which commenced on the date he was originally sentenced (R. 8). "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Bozza* v. *United States,* 330 U. S. 160, 166–167.[3]

[3] Petitioner also argues (Pet. 15–17) that both counts charge an offense under subsection (b) of the statute, since the first count, while purporting to charge robbery alone, in effect stated all the facts essential to robbery aggravated by assault with a dangerous weapon. Without conceding that petitioner's interpretation of the first count is correct, we think the argument is unavailing, since the fact still remains that either of the sentences could validly have been imposed under subsection (b), and the court and not the defendant should have the right to say which of them should be eliminated.

2. Petitioner's second argument is that the sentences imposed were alternative sentences for the same crime, and that since he has fully satisfied one of the alternatives he is entitled to immediate discharge (Pet. 17–20). It is true that in *Ex Parte Lange,* 18 Wall. 163, and *In re Bradley,* 318 U. S. 50, this Court held that where one of two alternative punishments, prescribed by statute, has been legally satisfied, any attempt to compel the prisoner to serve the other alternative subjects him to double jeopardy. The rule clearly applies in all cases where the alternative punishments are mutually exclusive. Thus, in the *Lange* and *Bradley* cases, where the statute prescribed a fine *or* imprisonment, the imposition of both subjected the defendant to double jeopardy. So also in *Holbrook* v. *United States, supra,* also cited by petitioner, the sentences imposed were consecutive, and service of both would have constituted double jeopardy. But we submit that where, as here, the sentences are concurrent, there is no double jeopardy and the rule does not apply. The sentencing court obviously intended that petitioner be imprisoned for 25 years for his violation of subsection (b). The 15-year concurrent sentence on the first count added nothing to that punishment.

CONCLUSION

The decision of the circuit court of appeals is correct, and in view of the fact that the circuit

courts of appeals have consistently upheld the heavier sentence in cases arising under this section of the National Banking Act, no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948